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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee, v. REYNALDO JESUS LEDESMA, Appellant.	2 CA-CR 2010-0292 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20093783001

Honorable Terry L. Chandler, Judge

AFFIRMED

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E S P I N O S A, Judge.

¶1 After a jury trial, Reynaldo Ledesma was convicted of first-degree burglary, armed robbery, trafficking in stolen property, and four counts of aggravated

assault with a deadly weapon or dangerous instrument. The trial court sentenced him to a combination of concurrent and consecutive prison terms totaling eighteen years. On appeal, Ledesma argues the court erroneously instructed the jury that the state had no burden to prove the firearm in this case was not permanently inoperable. He also contends there was insufficient evidence to support his armed-robbery conviction. For the following reasons we affirm.

Factual Background and Procedural History

¶2 "On appeal, we view the facts in the light most favorable to upholding the verdict and resolve all inferences against the defendant." *State v. Klokic*, 219 Ariz. 241, n.1, 196 P.3d 844, 845 n.1 (App. 2008). The facts surrounding Ledesma's convictions involve two related incidents that both occurred on September 24, 2009. Paul R. was in his brother's two-story condominium when he heard "loud thumps" at the back door. He investigated and found the door broken open and a pickaxe on the floor. Paul then encountered Ledesma, who was holding a backpack while coming down the stairs. After Paul told him, "I'll give you a chance to put down what you got and get out," Ledesma pulled a gun from his pocket and pointed it at Paul. Ledesma then started "banging [the gun] around," which led Paul to conclude he "was trying to cock it back and work it." Paul fled, and Ledesma never fired the gun.

¶3 After being notified of the incident, Eddie R., the owner of the condominium, and TynaAnn H., his girlfriend who also lived there, determined that certain of their belongings were missing, including Eddie's loaded gun and TynaAnn's jewelry and backpack. That same day, they drove to pawnshops in the area to search for

their stolen property. At the third pawnshop, an employee had to unlock the door remotely for them to enter. Once inside, TynaAnn recognized her jewelry on a counter and notified the owner it belonged to her. A man seated off to one corner, later identified as Ledesma, appeared nervous and demanded to be let out of the store; the owner unlocked the door for him after he threatened he had a gun. He ran outside, and, upon being followed pointed the gun at Eddie and another individual and then ran away. Eventually, police apprehended him and recovered the gun. He was convicted and sentenced as outlined above. We have jurisdiction over his appeal pursuant to A.R.S. §§ 12-120.21(A)(1), 13-4031, and 13-4033(A)(1).

Discussion

Jury Instruction

¶4 Ledesma first argues the trial court erroneously instructed the jury that "[t]he state is not required to prove that a firearm is not permanently inoperable." Ledesma acknowledges he failed to object to the instruction below, thereby forfeiting review for all but fundamental, prejudicial error. *See State v. Henderson*, 210 Ariz. 561, ¶¶ 19-20, 115 P.3d 601, 607 (2005). Under this standard of review, the defendant has the burden of establishing "both that fundamental error exists and that the error in his case caused him prejudice." *Id.* ¶ 20.

¶5 The jury found Ledesma had used a firearm to commit the burglary, the armed robbery, and four of the aggravated-assault offenses, leading to enhanced sentences for these convictions. *See* A.R.S. §§ 13-105(13) (threatening exhibition of deadly weapon constitutes dangerous offense), 13-704 (dangerous-offense sentencing).

Use of a firearm also established an essential element of the first-degree burglary and aggravated-assault offenses. *See* A.R.S. §§ 13-1508(A) (first-degree burglary), 13-1204(A)(2) (aggravated assault). As it pertains to this case, a "[f]irearm" is defined as "any loaded or unloaded handgun . . . except . . . a firearm in permanently inoperable condition." § 13-105(19).

¶6 Ledesma maintains that *State v. Rosthenhausler* explains whose burden it is to prove (or disprove) permanent inoperability. 147 Ariz. 486, 711 P.2d 625 (App. 1985). In *Rosthenhausler*, we held the state is not required to prove a firearm is not permanently inoperable when a defendant has presented no evidence of its inoperability. *Id.* at 493, 711 P.2d at 632; *see also State v. Valles*, 162 Ariz. 1, 7, 780 P.2d 1049, 1055 (1989) (following *Rosthenhausler*). In dicta, however, we postulated that when a defendant does present evidence establishing reasonable doubt as to a firearm's operability, the burden would shift to the state to disprove permanent inoperability. *Rosthenhausler*, 147 Ariz. at 492-93, 711 P.2d at 631-32. Relying on this dictum, Ledesma contends that because some evidence was presented at trial that he was unable to operate the gun, the state had the burden of proving beyond a reasonable doubt that the gun was not permanently inoperable.

¶7 Although the state relied on *Rosthenhausler* below, it contends on appeal that this court should be guided by A.R.S. § 13-205(A), which sets forth, in part: "Except as otherwise provided by law, a defendant shall prove any affirmative defense raised by a preponderance of the evidence." *See also* 1997 Ariz. Sess. Laws, ch. 136, § 4 (adding § 13-205(A) after *Rosthenhausler* decided). Section 13-205(A) therefore would place the

burden of proving permanent inoperability on the defendant unless, as Ledesma argues, the burden is "otherwise provided by law."

¶8 We need not decide which burden allocation applies, however, because even were we to follow *Rosthenhausler*'s dictum, Ledesma failed to "come forward with evidence establishing a 'reasonable doubt' as to the operability of the firearm," 147 Ariz. at 493, 711 P.2d at 632; therefore, the state had no burden to disprove permanent inoperability. Although Ledesma supports his argument with Paul's testimony that Ledesma "tr[ied] to cock [the gun] back and work it," tried to pull the trigger, and, when the gun did not fire, "started banging . . . the side of it," we agree with the trial court that this evidence alone was not "evidence establishing a 'reasonable doubt' as to the operability of the firearm." *Id.* Eddie, the gun's owner, testified that although he had never fired the gun, he had "rack[ed] the chamber" when he bought it to confirm that it functioned. Moreover, there was no evidence that the gun or any of its components was defective. Therefore, Paul's testimony did not establish reasonable doubt as to the operability of the gun; rather, it suggested Ledesma did not immediately know how to operate an unfamiliar weapon. Accordingly, Ledesma did not meet the burden of establishing reasonable doubt under *Rosthenhausler*, much less a preponderance of the evidence under § 13-205(A). The trial court therefore did not commit fundamental error by instructing the jury that the state was not required to prove the gun was not permanently inoperable.[1]

[1]Ledesma also argues the jury instruction violated his due process rights by relieving the state of its burden of proof. *See* U.S. Const. amends. V and XIV, § 1; Ariz.

Armed Robbery

¶9 Ledesma next contends the trial court abused its discretion in denying his motion for judgment of acquittal of armed robbery pursuant to Rule 20, Ariz. R. Crim. P., arguing he could not be convicted of that offense because he already had gained possession of the items from the condominium by the time he had the confrontation with Paul. As the state points out—and contrary to Ledesma's contention on appeal—he did not raise this issue in his motion for judgment of acquittal. The state acknowledges, however, that he also argues his conviction was based on insufficient evidence, constituting fundamental error; we therefore review his argument in that context. *See Henderson*, 210 Ariz. 561, ¶ 19, 115 P.3d at 607.

¶10 Section 13-1904, A.R.S., provides that "[a] person commits armed robbery if, in the course of committing robbery as defined in [A.R.S.] § 13-1902, such person . . . [i]s armed with a deadly weapon or a simulated deadly weapon" or "[u]ses or threatens to use a deadly weapon . . . or a simulated deadly weapon." Section 13-1902(A) provides:

> A person commits robbery if in the course of taking any property of another from his person or immediate presence and against his will, such person threatens or uses force against any person with intent either to coerce surrender of property or to prevent resistance to such person taking or retaining property.

Ledesma concedes he took Eddie and TynaAnn's property and does not deny he threatened Paul with a deadly weapon or simulated deadly weapon as he attempted to

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Const. art. II, § 4. Because we find the state had no burden to disprove permanent inoperability in this case, however, we likewise find no deprivation of due process.

leave the residence. *See* § 13-1904(A)(2). Thus, the only question before us is whether Ledesma threatened force "to prevent resistance to [his] taking or retaining [the] property." § 13-1902(A).[2]

¶11 Relying on *State v. Celaya*, 135 Ariz. 248, 660 P.2d 849 (1983), Ledesma asserts that "where a thief has gained peac[e]able possession of property, and uses violence only to escape, he has not committed robbery." In *Celaya*, the defendant had met with an undercover law-enforcement officer to make a drug sale. *Id.* at 250, 660 P.2d at 851. The officer gave the defendant a bag of money, which the defendant placed into his car. *Id.* The defendant then returned to the officer's car with a bag purportedly containing drugs and shot him. *Id.* Our supreme court held that "[i]f the jury believed [the defendant]'s version of the facts, they could rationally find that he gained control of [the officer]'s money without threat of force and that the taking of the money was complete when [the defendant] put the bag in his own car," thus supporting a conviction for theft, but not for robbery. *Id.* at 252, 660 P.2d at 853. The court stated:

> Arizona Revised Statutes § 13-1902 requires that the element of force be found to have been used to either take the property or to resist the retaking of the property. However, robbery is not committed when the thief has gained peaceable possession of the property and uses no violence except to resist arrest or effect his escape.

[2]Ledesma does not raise the question of whether the robbery statute applies where, as here, a defendant takes property from the immediate presence of someone with no ownership or possessory interest in the property. Consequently, we do not address the question.

Id. Thus, the resolution of this issue hinges on whether Ledesma threatened force not merely to "resist arrest or effect . . . escape," *id.*, but to "prevent resistance" to his retaining the property he had taken, § 13-1902(A).[3]

¶12 We agree with the state there was sufficient evidence to support the conclusion Ledesma had threatened force to prevent Paul from resisting his retention of the stolen property. In *Celaya*, the defendant already had secured the money in his car before returning to the officer's car and using force, clearly establishing that he used force to escape rather than to retain the money. 135 Ariz. at 252, 660 P.2d at 853. Ledesma, by contrast, had not secured the property elsewhere when he threatened force against Paul; rather, he had in his immediate possession the gun and other items throughout the confrontation. Moreover, he did not display the gun until after Paul had told him to put down the stolen property and leave, which further supports the conclusion Ledesma threatened force in order to retain the stolen property.

¶13 Ledesma finally argues he did not commit robbery because, "[E]ither [he] possessed the firearm he was stealing or he did not. If he did possess it, then his use of it could not be to obtain control over it." But this argument assumes the only way to commit robbery is to threaten or use force to obtain control over property. As we have noted, § 13-1902(A) provides that robbery may also be accomplished by the threat or use

[3]Ledesma correctly notes in his reply brief that the state failed to discuss *Celaya* in its answering brief; however, because the state otherwise responded to his argument that he threatened force merely to effect his escape, the omission, while unhelpful to this court in its review of the issue, is not a confession of error. *Cf. In re 1996 Nissan Sentra*, 201 Ariz. 114, ¶ 7, 32 P.3d 39, 42 (App. 2001) (finding confession of error where answering brief failed to address entire argument).

of force to retain control over property. Thus, because there was evidence Ledesma used the gun to retain possession of the gun and the other property, this argument is unpersuasive. Substantial evidence supports the conclusion that Ledesma threatened force to prevent Paul from resisting his retention of the stolen property, and we therefore find no error.[4]

Disposition

¶14 For the foregoing reasons, Ledesma's convictions and sentences are affirmed.

/s/ Philip G. Espinosa
PHILIP G. ESPINOSA, Judge

CONCURRING:

/s/ J. William Brammer, Jr.
J. WILLIAM BRAMMER, JR., Presiding Judge

/s/ Joseph W. Howard
JOSEPH W. HOWARD, Chief Judge

[4]Ledesma also argues the armed-robbery conviction violated his due process right "to be convicted only under evidence sufficient to prove guilt beyond a reasonable doubt." *See* U.S. Const. amends. V and XIV, § 1; Ariz. Const. art. II, § 4. Because we find substantial evidence supported his conviction, however, there was no due process violation.